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In The

Supreme Court of the United States

OCTOBER TERM 1970

No. ~~1805~~ 70-261

JOSEPH P. SCOTT,

Petitioner,

-against-

THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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In the

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1970

NO. _____

JOSEPH P. SCOTT,

Petitioner,

against

THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

Joseph P. Scott hereby petitions for a writ of certiorari to review the decision of the Court of Appeals of the State of New York affirming the dismissal of petitioner's claim against the State of New York for false imprisonment.

The basis of petitioner's claim is that he was denied rights mandated by the Constitution of the United States of America in being imprisoned for more than sixteen years at Matteawan State Hospital under an unconstitutional statute.

Opinions Below

The New York State Court of Claims dismissed petitioner's claim for false imprisonment. No opinion was rendered on this dismissal.

The Appellate Division of the Supreme Court of the State of New York, Third Judicial Department, affirmed the Court of Claims. The opinion is reported at 34 A.D. 2d 1041, 312 N.Y.S.2d 284. A copy of the decision of the Appellate Division is annexed hereto as Appendix A.

Thereafter the Court of Appeals affirmed the dismissal of petitioner's claim, without opinion. A copy of the decision of the Court of Appeals is annexed hereto as Appendix B. (The decision of the Court of Appeals has not yet been reported.)

Jurisdiction

The order sought to be reviewed was made and entered on April 21, 1971.

The appeal to the Court of Appeals of New York was on constitutional grounds. Under New York State practice, an appeal could not be taken to the Court of Appeals from an affirmance by the Appellate Division where there was no dissent, unless the appeal was on constitutional grounds or unless permission was obtained for such appeal. No permission was obtained to prosecute such appeal but the Court of Appeals heard the appeal and affirmed the order of the Appellate Division. Had the Court of Appeals been of the opinion that no constitutional question was presented, it would have dismissed the appeal.

Jurisdiction

The statutory provision which confers jurisdiction on this Court is 28 U.S.C. 1257 (3).

Questions Presented

1. May the State of New York, which has waived its sovereign immunity, refuse to recognize a claim for false imprisonment based upon the illegal detention of petitioner under an unconstitutional statute?

2. Where a law is unconstitutional but has never been declared so by the courts, should the burden resulting from the enforcement of that law fall upon the state which enacted and enforced it, or should the entire onus be borne by the unfortunate victim of that illegal legislation?

3. Is the unconstitutionality of former Section 409 of New York's Correction law to be given retrospective effect by the courts in recognizing a claim for compensatory, monetary damages?

The Facts

On February 2, 1947, the petitioner, Joseph P. Scott, was sentenced to be imprisoned for a maximum term of three years for setting a building on fire. His full term of imprisonment should have expired on February 2, 1950.

Petitioner was incarcerated at the New York State Vocational Institute at Coxsackie, New York. While there, the prison officials thought that he was insane, and thereupon an application was made

to Judge Fromer of Greene County, to transfer Scott from the New York State Vocational Institute at Coxsackie to Matteawan State Hospital at Beacon, New York. Matteawan was an institution maintained by the State of New York to retain insane prisoners.

At the time when the application was made to Judge Fromer, Scott was purportedly served with a notice that the warden was about to move before Judge Fromer to transfer him to Matteawan State Hospital. In spite of the fact that he was served with these legal papers, he was prevented by his very incarceration from appearing before Judge Fromer to oppose the warden's application. No guardian, attorney, or other person was appointed to represent Scott's interests on this application to transfer him. Furthermore, no one other than Scott was given notice of the application to transfer him. Judge Fromer signed the warden's application without any opposition.

On or about June 22, 1949, Scott was transferred to Matteawan State Hospital pursuant to Judge Fromer's order. At the time he was twenty years of age.

In 1949, when Scott was transferred to Matteawan State Hospital, New York State had two institutions to care for insane prisoners. Matteawan State Hospital was one of these and Dannemora was the other. Peculiarly, the laws pertaining to the rights of an inmate at the expiration of his prison term differed, depending on which institution the inmate was sent to.

The Facts

If a prisoner was sent to Dannemora State Hospital, pursuant to former Section 384 of New York's Correction Law, at the expiration of his term the director would have to get a court order based upon the examination of two qualified examiners to retain him. A copy of that statute is annexed hereto as Appendix C. It is to be noted that that statute was declared unconstitutional by this Court in Baxstrom v. Herold, 383 U.S. 107; 15 L.Ed. 2d, 620, 86 S.Ct. 760.

On the other hand, men like Scott, who had perchance been sent to Matteawan State Hospital rather than Dannemora State Hospital, were dealt with under former Section 409 of New York's Correction Law. This statute afforded them less rights than those retained at Dannemora State Hospital under Section 384. A copy of former Section 409 of New York's Correction Law is annexed hereto as Appendix D.

Under Section 409, men like Scott who had neared the expiration of their prison terms, were given no independent examination, and no court order was obtained permitting their retention after the expiration of their prison terms. Section 409 merely provided that these men may be retained at Matteawan State Hospital — presumably to vegetate for the remainder of their natural lives — without any independent determination of their mental condition or any court order permitting their retention.

Under that law, Scott was kept at Matteawan until March 25, 1966, more than sixteen years

after his prison term had expired and his debt to society was paid. On that date, which followed the decision of this Court in Baxstrom v. Herold, supra, Scott was removed from Matteawan State Hospital and transferred to Manhattan State Hospital, a civil institution, rather than a penal institution such as Matteawan.

The officials of New York State's Department of Mental Hygiene released Scott to society on June 27, 1966, after but two months of treatment in a civil mental institution.

Constitutional Provisions Involved

Amendment XIV, Section 1:

> ". . . or shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Argument

I.

THE CONSTITUTIONAL RIGHTS DENIED SCOTT WERE FUNDAMENTAL AND SHOULD BE RETROSPECTIVELY APPLIED.

As already set forth, when petitioner's original prison sentence expired in 1950, he would have had different rights if he were in Dannemora State Hospital than he had because he was sent to Mat-

teawan State Hospital. Had Scott been sent to Dannemora State Hospital, the Director would have had to obtain a court order based upon the reports of independent examiners to retain him beyond his prison term. The machinery afforded men who were sent to Dannemora State Hospital was vastly different from the procedure afforded to persons who had never been convicted of a crime but who were retained by the state in civilian mental institutions.

In Baxstrom v. Herold, supra, this Court held that former Section 384 of New York's Correction Law was unconstitutional. This finding of unconstitutionality was based upon two grounds, namely: (1) That the procedure for determining whether men who were previously convicted of a crime should be retained was different from the procedure given to those who had never been convicted of a crime; (2) that a penal institution such as Dannemora State Hospital and operated by the Department of Correction gave the inmates less freedom than was given to inmates in civilian institutions.[1]

In Baxstrom v. Herold, supra, Chief Justice Warren stated:

> "We hold that petitioner was denied equal protection of the laws by the statutory pro-

1. Appendix E contains a list of freedoms from the claim asserted by the petitioner in the Court of Claims which are available in civilian mental institutions but which were denied to men like petitioner who were retained in a penal institution such as Matteawan State Hospital.

cedure under which a person may be civilly committed at the expiration of his penal sentence without the jury review available to all other persons civilly committed in New York. Petitioner was further denied equal protection of the laws by his civil commitment to an institution maintained by the Department of Correction beyond the expiration of his prison term without a judicial determination that he is dangerously mentally ill such as that afforded to all so committed except those, like Baxstrom, nearing the expiration of a penal sentence."

If Section 384 was unconstitutional, obviously Section 409 under which Scott was retained was also unconstitutional. Section 409 gives the prisoner less rights than one held under Section 384 would have.

Section 409 is unconstitutional because of an invidious discrimination between those who were retained at Matteawan and those retained in civilian institutions. Furthermore it is again unconstitutional because of a more invidious discrimination between those who were retained at Matteawan and those who were retained in Dannemora State Hospital. Indeed, the State of New York has conceded throughout the Appellate process of this case that Section 409 is unconstitutional.

Although the State of New York concedes that former Section 409 of New York's correction law is unconstitutional, it has successfully argued below that this unconstitutionality should not be retro-

spectively applied. This argument was based upon the prior decision of the New York State Court of Appeals in Dennison v. State of New York, 23 N.Y. 2d 996, 298 N.Y.S. 2d 1002, 246 N.E. 2d 760, Motion to amend Remittitur granted, 25 N.Y. 2d 904, 304 N.Y.S. 2d 596, 252 N.E. 2d 130, cert. denied, 397 U.S. 923, 25 L.Ed. 2d 103, 90 S.Ct. 922. In Dennison, the Court of Appeals of New York determined that it would not retrospectively apply the unconstitutionality of former Section 384 of New York's Correction Law to give Dennison a claim for damages.

Former Section 384 had previously been held constitutional by New York's Court of Appeals in People ex rel. Kamisaroff v. Johnston, 13 N.Y.2d 66, 242 N.Y.S.2d 38. Later this Court overruled the Kamisaroff case in Baxstrom v. Herold, supra.

Former Section 409, under which petitioner was retained, had never been held constitutional by any court. Nevertheless, the State of New York argued in this case, as it did in Dennison, that the unconstitutionality of Section 409 was something new and unexpected and damages should not be assessed against the State for its failure to anticipate the unconstitutionality of that law.

We submit that this Court has yet to expound on the problem of when the unconstitutionality of laws should be retrospectively applied in a civil case. Therefore, this case presents an issue of constitutional law which has been determined by the courts of New York but has not heretofore been determined by this Court.

Argument

Our theory of common law is normally based upon the notion that the law is what the law is, which may or may not be the same as what the judges say the law is. Since under that theory the law itself does not change, this Court initially held in Norton v. Shelby County, 118 U.S. 425; 30 L.Ed. 178, 6 S.Ct. 1121; that all decisions must be given retrospective as well as prospective application.

Of late, however, this Court has seen fit to expand the rights of those accused of crime in ways never previously deemed mandated by the constitution. In Mapp v. Ohio, 367 U.S. 643, 6 L.Ed. 2d 1081, 81 S.Ct. 1684, it was held that evidence obtained by illegal search and seizure could not be used in State prosecutions.

A new right of accused to be represented by counsel was first recognized in Gideon v. Wainwright, 372 U.S. 335, 9 L.Ed. 2d 799, 83 S.Ct. 792, 93 A.L.R. 2d 733.

In Miranda v. Arizona, 384 U.S. 436, 6 L.Ed. 2d 695, 86 S.Ct. 1602[2] and Escobedo v. Illinois, 378 U.S. 478, 12 L.Ed. 2d 977, 84 S.Ct. 1758, this Court imposed new restrictions on custodial questioning by police.

These and other newly announced rights might

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2. It has been suggested by many that the recent decision of Harris v. New York, ____ U.S. ____ 28 L.Ed. 2d 1, 91 S.Ct. ____ has severely limited the effect of Miranda.

have created difficulties in the enforcement of our criminal laws. As a result then, this Court departed from its decision in Norton v. Shelby County, supra, and no longer requires retrospective application be given to all newly discovered rights in criminal cases.

In Linkletter v. Walker, 381 U.S. 618, 14 L.Ed. 2d 601, 85 S.Ct. 1731, this Court stated that the Constitution "neither prohibits nor requires" that retrospective application be given to all newly discovered rights.

This new and more flexible formula was further explained in Johnson v. New Jersey, 384 U.S. 719, 16 L.Ed. 2d 882, 86 S.Ct. 1772, rehearing denied, 385 U.S. 890, 17 L.Ed. 2d 121, 87 S.Ct. 12.

The new rule requires a balance to be struck between the inconvenience to the individuals and the inconvenience to the states in determining if retrospective application is to be granted to newly discovered rights. On one side of this balance is the degree to which the "integrity of the fact-finding process" is affected by the newly discovered right. Johnson v. New Jersey, supra, Roberts v. Russell, 392 U.S. 293, 20 L.Ed. 2d 1100, 88 S.Ct. 1921; Berger v. California, 393 U.S. 314, 21 L.Ed. 2d 508, 89 S.Ct. 540. On the other side of the scale, we have the inconvenience to the states resulting from the retrospective application of the right. If it could be shown, for instance, that law enforcement authorities had placed great reliance on the old standards or that

retrospective application of the newly discovered right would severely affect the administration of justice, the scales would be weighted toward prospective application only. Fuller v. Alaska, 393 U.S. 80, 21 L.Ed. 2d 212, 89 S.Ct. 6; Halliday v. U.S., 394 U.S. 831, 23 L.Ed. 2d 16, 89 S.Ct. 1498; Jenkins v. Delaware, 395 U.S. 213, 23 L.Ed. 2d 253, 89 S.Ct. 1657, cf; Stovall v. Denno, 388 U.S. 293, 18 L.Ed. 2d 1199, 87 S.Ct. 1967; Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed. 2d 776, 88 S. Ct. 1770; De Backer v. Brainard, 396 U.S. 28, 24 L.Ed. 2d 148, 90 S.Ct. 163; Parker v. North Carolina, 397 U.S. 790, 25 L.Ed. 2d 785, 90 S.Ct. 1458; Cipriano v. Houma, 395 U.S. 701, 23 L.Ed. 2d 647, 89 S.Ct. 1897.

Application of this new and more flexible formula in criminal cases has given the courts quite a bit of difficulty. For example, where counsel was denied at the time the defendant was identified by the victim before the trial, that denial of counsel did not sufficiently affect the integrity of the fact-finding process to an extent that would require retrospective application. Stovall v. Denno, supra. On the other hand where counsel was denied to an accused on sentencing, that affected the integrity of the fact-finding process to a large enough degree as to require retrospective application. McConnell v. Rhay, 393 U.S. 2, 21 L.Ed. 2d 2, 89 S.Ct. 32.

Obviously courts must consider different factors in determining whether retrospective application be given to newly discovered rights in civil cases than in criminal cases.

Argument

We submit that the purpose of the doctrine of prospective application is not to limit newly discovered rights to those clients who are fortunate enough to have lawyers able to discover newly found rights while denying similar relief to others similarly situated whose lawyers could not envision new constitutional rights. The purpose of the doctrine of prospective application is to strike a balance between the inconvenience to the states which would result from the retrospective application of a newly discovered right against the harm inflicted on the individual who was denied that right. In striking such a balance in a civil cause such as this, where all that is sought is compensatory damages, it must be realized that what the law is doing is recognizing that a loss has been suffered as a result of a wrong which we now see and placing the onus of that loss on the wrongdoer.

No attempt is being made in this litigation to punish the State of New York for what it did to Joseph P. Scott. Our argument is based upon the proposition that today it is recognized that a wrong was committed. The burden that the State would have to bear by retrospective application of the rights granted because Section 409 of New York's Correction Law was unconstitutional would not be greater than what has been being borne by Scott and other unfortunates. These victims had no say in the enactment or enforcement of that illegal legislation.

It is our contention that Dennison v. State of New York, supra, was improperly decided by the

courts of New York. On the other hand we also recognize that this case is even stronger than Dennison. In determining when retrospective application should be granted, this Court has stated that one of the criteria is the degree to which the right denied the individual affects the integrity of the fact-finding process. In Dennison there was an attempt to determine whether Dennison should be retained at the expiration of his term. Under former Section 384 two independent examiners were appointed by the Court to determine Dennison's mental condition. Thus, although there was no adversary fact-finding procedure in Dennison, there was some independent fact-finding machinery.

Scott, (petitioner herein), however, was deprived of his freedom without any independent fact-finding machinery. Section 409 provided no independent means of determining the inmate's mental condition at the expiration of his prison term.

In substance then plaintiff is merely asking for compensatory damages. The burden imposed on the state is no greater than the burden which was borne by petitioner and others similarly situated.

II.

IN DECIDING THIS CASE, THE COURTS OF NEW YORK NECESSARILY PASSED UPON AN IMPORTANT CONSTITUTIONAL ISSUE.

Argument

Petitioner claimed initially that he was denied rights guaranteed by the Constitution of the United States. This assertion was first made in his "claim" — the first pleading filed by petitioner to institute the action in New York's Court of Claims. It was alleged inter alia in that very first pleading:

> "Thirteenth: That the said Sections 408 et seq of the Correction Law, to the extent that they authorized detention of the patient in Matteawan State Hospital violated the Constitution of the United States and the Constitution of the State of New York . . . ."

The constitutional issue was thus raised initially in the court of original jurisdiction. The same constitutional question was argued in the Appellate Division of the Supreme Court, as appears from their decision. Thereafter petitioner appealed to New York's Court of Appeals as of right, pursuant to Subdivision (b)1 of Section 5601 of New York's Civil Practice Law and Rules. (A copy of Section 5601 of New York's Civil Practice Law and Rules is annexed as Appendix F.)

Under the practice in effect in New York, had there not been a constitutional issue, the Court of Appeals would have been powerless to hear and determine this petitioner's appeal. Indeed it was argued by the State of New York that the Court of Appeals had no jurisdiction for lack of a constitutional issue. The State requested the Court of Appeals to dismiss the appeal for want of a constitutional issue.

Argument

Rather than dismiss the appeal, the Court of Appeals affirmed the order of the Appellate Division. This finding of jurisdiction to affirm necessarily was a finding of a constitutional issue.

It is to be noted that the Court of Appeals in Dennison found that a constitutional issue was raised and amended its remittitur to so indicate. The Court of Appeals found the same constitutional issue in this case when it asserted jurisdiction.

Furthermore, this Court has found substantial constitutional issues where the only question is not unconstitutionality of the statute but whether that constitutionality should be retrospectively applied. The cases which we have cited in the first point of this brief are but a few examples of this type of constitutional issue which was passed upon by this Court.

We believe that the fact that this Court refused to pass upon this issue in Dennison, supra, should not operate to bar the Court from hearing and determining this important constitutional issue in the case at bar. We only reiterate and emphasize the importance of the question presented in this case. That is when rights that are newly found should be retrospectively applied in civil causes. Because this Court has tried to limit the retrospective effect of newly found rights in criminal cases, those citizens who have civil claims based upon constitutional questions may find their rights to compensatory damages placed in jeopardy. We submit that it was not the purpose of this Court to jeopardize a damage suit based upon consti-

tutional issues because of the doctrine of prospective application.

The issue involved in this case will affect all past and future determinations of this Court. It is not limited to rights under a revoked statute but applies equally as well to all newly found and to be found rights arising under the Constitution.

For these reasons, we believe that there is presented herein an important constitutional question which ought to be reviewed by this Court.

Conclusion

For the foregoing reasons, this petition for a writ of certiorari should be granted and upon granting certiorari, the Court should reverse the determination of New York's Court of Appeals.

Respectfully submitted,

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Of Counsel

APPENDIX A

Decision of Supreme Court, June 29, 1970

June 29, 1970 11797

JOSEPH P. SCOTT, Appellant,

v.

STATE OF NEW YORK, Respondent.

MEMORANDUM BY THE COURT.

Appeal by the claimant from an order of the Court of Claims, entered on June 22, 1967, which dismissed his claim for damages pursuant to a pretrial motion by the State. The appellant seeks damages for his detention at Matteawan State Hospital after termination of his sentence of imprisonment in 1950 until his transfer to a civilian State hospital in 1966. The record establishes that the procedures for commitment to Matteawan and retention therein as provided in section 408 et seq. as in effect during the period of time in question were followed by the County Judge of Greene County and apparently by the officials at Matteawan. The claimant made no allegation that he was at any time sane or that he is at present sane, but instead alleged that the confinement at Matteawan pursuant to the Correction Law in 1950 was false imprisonment as the provisions of section 408 et seq. and particularly section 409 were unconstitutional. The State concedes that the provisions for retention at Matteawan upon the termination of the claimant's sentence pursuant to section 409 of the Correction Law were unconstitutional. The claimant limits his claim for damages

to the unavailability of privileges at Matteawan which he would have had at a civilian institution. (Cf. Matter of Negro v. Dickens, 22 A D 2d 406, 408.) The claim in this case is essentially the same as that considered in Dennison v. State of New York (28 A D 2d 608, 609, affd. 23 N Y 2d 996, mot. to amend remittitur gtd. 25 N Y 2d 904, cert. den. 397 U.S. 923, 90 S. Ct. 922, 25 L.Ed. 2d 103 (February 24, 1970).

Order affirmed, without costs.

HERLIHY, P.J., REYNOLDS, STALEY, JR., GREENBLOTT and SWEENEY, JJ., concur in memorandum by the Court.

APPENDIX B

Decision of Court of Appeals of State of New York

3. No. 557. 70

Joseph P. Scott,
Appellant,
vs.
The State of New York,
Respondent.

Order affirmed, without costs.
No opinion.
All concur.

APPENDIX C

Copy of Section 384 of New York's Correction Law

§384. Retention of insane prisoners after the expiration of their terms

When the term of a prisoner confined in Dannemora state hospital has expired, and, in the opinion of the superintendent, such prisoner continues insane, the superintendent shall apply to a judge of a court of record to cause an examination to be made of such person, by two legally qualified examiners, other than a physician connected with such hospital, qualified as provided in the mental hygiene law. Such examiners shall be designated by the judge to whom the application is made. Such examiners, if satisfied, after a personal examination, that such prisoner is insane, shall make a certificate to such effect in the form and manner prescribed by article five of the mental hygiene law, for the commitment of insane persons to state hospitals. Such superintendent shall apply to a judge of a court of record for an order authorizing him to retain such prisoner at the Dannemora state hospital, accompanying such application with such certificate in lunacy. Such judge, if satisfied that such prisoner continues insane, shall issue such order of retention, and such superintendent shall thereupon retain the prisoner at Dannemora state hospital until discharged as provided by law. The certificate in lunacy and order of retention shall be kept by the superintendent in his office, and a copy thereof shall be filed in the office of the department of mental hygiene. The costs necessarily incurred in determining the question of insanity, including

the fees of the medical examiners, shall be a charge upon the amount appropriated for the support and maintenance of the Dannemora state hospital, and be paid in the same manner as are other expenses of such hospital.

APPENDIX D

Copy of Former Section 409 of New York's Correction Law

Section 409. Disposal of insane prisoners after expiration of term or imprisonment.

Whenever any prisoner in the Matteawan state hospital shall continue to be insane at the expiration of the term for which he was sentenced, he may be retained therein until he has recovered or is otherwise legally discharged. The superintendent of such hospital may discharge and deliver any patient whose sentence has expired, and who is still insane, but who, in the opinion of the superintendent is reasonably safe to be at large, to his relatives or friends who are able and willing to comfortably maintain him, without further public charge; and such patient may, in the discretion of the superintendent, be provided with the whole or a portion of such allowances as are hereinafter granted to recovered prisoners. Whenever any prisoner, who, by reason of his insanity, shall have been retained beyond the date of the expiration of his sentence shall recover, he may be discharged by the superintendent, and such prisoner shall be entitled to ten dollars in money,

Copy of Former Section 409 of New York's Correction Law

suitable clothing and a railroad ticket to the county of his conviction or to such other place as the commissioner of correction may designate at no greater distance. Any prisoner in the Matteawan state hospital, whose term of imprisonment has expired by commutation or otherwise, and who is not recovered may, upon an order of the commissioner of mental hygiene be transferred to any institution for the insane.

APPENDIX E

Rights Denied to Those in a Penal Institution which are Available to Mental Patients in a Civilian Hospital Pursuant to Paragraph "Eleventh" of Petitioner's Claim in New York State's Court of Claims

1. The right to unlimited correspondence.

2. The right to communicate with his family by telephone.

3. The right to freedom of the grounds.

4. The right to visit with his family outside of the hospital buildings.

5. The right to leave the hospital grounds with his family on visiting days.

6. The right to home visits with his family.

7. The right to trial visits at home.

8. The right to convalescent status.

APPENDIX F

Copy of Section 5601 of New York's Civil Practice Law and Rules

Section 5601. Appeals to the court of appeals as of right.

(a) Dissent, reversal or modification. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division which finally determines the action, (i) where there is a dissent on a stated question of law in favor of the party taking such appeal, or (ii) such order directs reversal of the judgment or order appealed from, or (iii) directs modification thereof in a substantial respect, which is within the power of the court of appeals to review on such appeal, and the party taking the appeal is aggrieved by the modification.

(b) Constitutional grounds. An appeal may be taken to the court of appeals as of right:

1. from an order of the appellate division which finally determines an action where there is directly involved the construction of the constitution of the state or of the United States; and

2. from a judgment of a court of record of original instance which finally determines an action where the only question involved on the appeal is the validity of a statutory provision of the state

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or of the United States under the constitution of the state or of the United States.

(c) From order granting new trial or hearing, upon stipulation for judgment absolute. An appeal may be taken to the court of appeals as of right in an action originating in the supreme court, a county court, a surrogate's court, the family court, the court of claims or an administrative agency, from an order of the appellate division granting or affirming the granting of a new trial or hearing where the appellant stipulates that, upon affirmance, judgment absolute shall be entered against him.

(d) Based upon non-final determination of appellate division. An appeal may be taken to the court of appeals as of right from a final judgment entered in a court of original instance or from a final determination of an adminstrative agency, or from an order of the appellate division which finally determines an appeal from such a judgment or determination, where the appellate division has made an order on a prior appeal in the action which necessarily affects the judgment or determination and which satisfied the requirements of subdivision (a) or of paragraph one of subdivision (b) except that of finality.